

DORSEY TO FIGHT MOTION

FOR A NEW FRANK TRIAL

Will Probably Rely on
Deci-

sion of Supreme
Court in

Famous Cawthon
Case

Interest in the case of Leo M. Frank now centers in the
unexpected move to set aside the verdict of guilty on the ground

that Frank was absent from the court room when it was rendered. Solicitor General Hugh M. Dorsey is preparing to vigorously combat the motion, which is set for a hearing on Wednesday morning.

The solicitor, it has been learned, will not only contend that the waiver by Frank's attorneys was sufficient, but that Frank had knowledge that the waiver was to be made and consented to it.

He will contend further, it is understood, that Frank passively, if not actively, consented to the waiver since he did not except to it in the original motion for a new trial. Mr. Dorsey will argue, it is said, that no point can be made in an extraordinary motion which was known at the time of the ordinary motion and not excepted to.

It is said that the solicitor will rely largely upon the decision of the Supreme Court of Georgia, written by Justice Andrew J. Cobb in the famous Cawthon case, 119 Georgia. The circumstances in the Cawthon case were very similar to those in the Frank case, as the following excerpt from the decision shows:

CAWTHON CASE VERDICT.

"The accused excepted to the action of the court in receiving the verdict his absence, the assignment of error in the bill of exceptions being in the following language: 'After the evidence, statement of prisoner, argument of counsel and the charge of the court had been concluded, and while the jury were out considering their verdict in the case, the presiding judge, with the consent of the defendant's counsel, and in the interest of the safety of the prisoner and the preservation of order, sent the defendant back to jail, and the verdict finding him guilty of murder was received in the absence of the prisoner, who was in jail under this charge and could not control his movements; and such reception of the verdict in the absence of the defendant, being also with the consent of defendant's counsel, who stated that they would take no exception thereto, and in the interest of the prisoner's safety and the preservation of order.'

“The defendant excepts to the receiving of the verdict finding him guilty of murder in his absence, as being illegal and in violation of his statutory and constitutional right to be present in the court room, when the verdict was received; and says that his counsel, although acting in perfect good faith and in the interest of his personal safety, had no legal authority to waive his right to be present; and he says that for this reason, the verdict in this case should be set aside.”

SMITH VS. STATE.

Commenting on this, the Supreme Court decision says: “In Smith vs. State, 59 Ga., 513, it was held that notwithstanding the accused may be in custody, he may consent that a verdict shall be received in his absence, and that a verdict received in his absence in pursuance of such consent is valid, notwithstanding he was at the time confined in jail. This case was not a capital felony, but we are unable to perceive any sound distinction, with reference to the prisoner’s right to waive his presence, between this class of felonies and any other.

“Without reference to whether the accused in a felony case can waive his right to be present during the progress of a trial between arraignment and verdict, it may be taken as settled that he may make an express waiver of his right to be present at the reception of the verdict.”

This last statement deals more specifically with the state’s fight on the defense’s contention that Frank had no right to waive his presence, even if he and his attorneys both desired that he remained away from court.

DEFENDANT’S PRESENCE.

Judge Cobb in writing the decision touches upon the point of counsel waiving a defendant’s presence without the consent of the defendant. He says:

“Speaking for myself, I am inclined to the opinion that the right to make the waiver resides in counsel, whether the accused

be present at the time of the waiver, his authority arising from the mere relation of attorney and client. The reasoning of the courts that hold to the contrary is not, in my opinion, satisfactory or by any means conclusive. Counsel is generally better able to take care of the rights of the accused than he is himself, and the accused is better protected from improvident waivers by his case being left to the control of his counsel. But under the facts of this case, it is not necessary for a direct ruling to be made upon this point, as, in our opinion, a waiver by counsel, in the presence of the accused, unrepudiated by him at the time of the waiver, is so binding as to make valid any action of the court based thereon."

Detective William J. Burns, who has been absent from the city, in Chicago and other cities, is not expected to return before Monday.

His report on the Frank case, disclosing much new evidence favorable to the defendant, which he is said to have discovered, will probably not be filed immediately upon his return. In the order signed by Judge Ben H. Hill in which the extraordinary motion for a new trial is filed, it is expressly stated that the paper can be amended at any time before its final disposition. As the motion to set aside the verdict will probably be argued first, Burns will have, probably a week more in which to complete the report.
